

Moving toward a fairer fee policy

A discussion paper from the Solicitors Regulation Authority and the Law Society on how the cost of regulation should be shared

Legal Services Act: New forms of practice and regulation
Consultation 19 – questionnaire form

30 June 2009

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For submission instructions, please see page 24.

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Question 1

Do you agree with the “principles and objectives of any new fee policy” outlined in paragraphs 19 and 20?

Yes

No

Comments

The proposed principles of fairness, simplicity, efficiency of administration, stability, and affordability are sensible, and should be embodied in any fee policy. The challenge will be to interpret the principles and achieve a balance between them, especially where they have the potential to conflict (e.g. between fairness and simplicity).

It is important that the understandable need for simplicity should not detract from setting fees in a way that fairly reflects the regulatory risk posed by individuals and firms, and thereby incentives reduction in risk. It is important that "fairness" is interpreted in this context. Fairness should not be interpreted to mean "similarity to the fees payable under the previous policy.

It is important that fairness must mean fairness in outcome, not just fairness in principle. We welcome the Law Society and SRA's intention to impact assess its proposals, and its commitment to promoting Equality and Diversity, which should be backed up with a commitment to monitor the effect of any new fee policy in practice.

A concern for the LSC is that legal aid solicitors should not incur significant additional costs because of the new fee policy. Impact assessment and subsequent monitoring should look at whether firms undertake publicly funded work, and assess any differential impact compared with firms that have an exclusively private client basis.

Question 2

Do you agree with the following principles?

- Fees charged to individuals should only cover the cost of those activities associated with the regulation of individuals (regardless of whether they work in private practice or not), rather than firms.
- Firms should pay a firm fee, to cover the remaining costs (i.e. the cost of activities associated with the regulation of private practice).

Yes

No

Comments

It is fair that the fees collected from individuals and firms should be proportionate to their respective costs of regulation. Inevitably, as the consultation points out, some costs are not clearly attributable to either. Whilst the consultation has its focus on questions of principle, it would be helpful to understand the proportion of fees over all that non-regulatory costs represent. Adjusting the way in which these non-regulatory costs are attributed between individuals and firms will be one way in which impacts can be mitigated.

The LSC believes that one of the key areas of regulation for both individuals and firms is quality. Over the years, the LSC has become a 'quasi regulator' for legal aid services. The LSC has developed quality tools (usually in close co-operation with representative bodies) to address what it saw as gaps in regulation by the profession. In particular, professional regulation had created no:

- widely used quality management standards
- compulsory category specific requirements on individual expertise or overall quality of advice.
- measures to assess advocacy

The current position places ownership of quality in legal aid work with the Commission, rather than with providers and regulators where it properly belongs. It also places the costs of quality assurance with the Commission, largely as an administrative expense. Whilst this may have been inevitable during the development phase, it is not a sustainable or desirable position. It has however benefited legal aid clients by giving them often greater assurance of quality than do the current requirements of the regulators for legal advice in the private market.

It is important that the fees collected from individuals and firms are adequate to enable the SRA and Law Society to maintain a robust system of quality assurance that enables clients and funders to make informed decisions about the organisations from which they buy services.

Question 3

Do you agree that the individual (i.e. practising) fee should be the same for all solicitors, regardless of the environment in which they work (e.g. commerce and industry, local government, private practice, etc.)?

Yes

No

Comments

If the costs of regulating individuals from all environments are broadly similar, there seems to be no justification for variation in the practising certificate fee

Question 4

Do you agree with the principle of using size (either annual turnover generated by legal fees or number of fee earners) as a proxy for the benefits of regulation?

Yes

No

Comments

The size of a firm is probably the best available proxy for its capacity to generate risk. However, SRA and Law Society should consider whether there are any other objective considerations that should be taken into account - such as whether a firm has an audited quality management system that it uses to help manage risk.

Question 5

Do you agree in principle that, if the PC fee was set low enough (e.g. at or below the current low income PC fee), special cases and reductions should be ruled out?

Yes

No

Comments

Provided that the individual fee becomes considerably lower, it is likely that the costs of collecting a more graduated fee would outweigh the benefits to individual practitioners. However, in taking forward the development of fees policy, the SRA and Law Society should look to quantify the likely cost of the practicing certificate in future, the scale of any discounts that could be offered, and the costs of administering a more complex scheme to allow for a reasoned consideration of the evidence. If set at £500 (the current low income PC fee) a 50% reduction would still represent a considerable saving for an individual on a low income.

Question 6

Do you agree with our definition of turnover (paragraph 52)?

Yes

No

Comments

The definition of turnover seems to be in line with definitions used elsewhere, and is both appropriate and easy for firms to understand. It is important that the definition should remain as close to that used by the Solicitors Indemnity Fund as possible.

Question 7

Do you agree with our definition of “fee earner” (paragraph 46)?

Yes

No

Comments

It is appropriate to include all of the different types of fee earner mentioned within the definition

Question 8

Do you think that using two variables (i.e. fee earners and turnover) to calculate fees gives great fairness than a model which uses just one variable?

Yes

No

Comments

The number of fee earners does not seem to be so closely aligned with the regulatory risk that a firm poses as is turnover. A large turnover generated by a small number of fee earners may well represent a greater risk than a smaller turnover generated by a greater number of staff. If fee earner numbers are to be taken into account at all, it should be through measures that look at the adequacy of supervision in a firm - i.e. that there are not too many inexperienced or unqualified fee earners working under the guidance of more experienced individuals.

Question 9

How easy would it be to identify accurately how many FTE fee earners are working in your firm?

- Easy—we already collect and collate this information.
- Straightforward—we have all relevant information on numbers of fee earners but do not collate this currently.
- Difficult—we do not hold detailed information on numbers of full-time and part-time fee earners.

Comments

This question is not directly applicable to the Legal Services Commission. However, we would expect firms that undertake legal aid work to be able easily to calculate FTE fee earner numbers, as this is something that we have required information on in past bid rounds.

Question 10

Which of the models in your opinion is the fairest for the profession?

- Model 1
- Model 2
- Model 3

Please explain

See answer to question 8 above. The additional variable of fee earner numbers would increase complexity without leading to a lot of difference in the fees charged within each band, and is not clearly related to regulatory risk. A simple, turnover based system, perhaps with discounts/uplifts for factors acknowledged to reduce/increase regulatory risk, would be more appropriate

Question 11

How do you think your firm or the group that you represent will be impacted by the model you selected in Question 10 above?

The LSC will not be directly affected by the model selected. The firms that undertake legal aid work do so within a tight business model, charging fees at rates considerably below private client rates. Their turnover is consequently quite low in proportion to their number of fee earners; and they have considerable reliance on non-solicitor fee earners. Legal aid lawyers could be disproportionately affected by a model based heavily on number of fee earners.

Question 12

Which of the models would you describe as “the worst case scenario”?

- Model 1
- Model 2
- Model 3

Please explain

Looking solely at fee earners, without having regard to turnover, could result in a disproportionate increase in fees for firms with a heavy reliance on legal aid work. There is no reason to think that these firms, all of which have quality management systems in place, and which work within the contractual framework specified by the Legal Services Commission, create a greater regulatory risk than do firms that rely on private client work.

Question 13

Do you agree with a fixed firm fee for new firms (paragraph 67)?

Yes

No

Comments

We agree with the Law Society's proposal for a fixed fee for new firms with no record of turnover. However, where a firm is formed mid way through a "regulatory year", it will not be until part way through its second regulatory year that it will have a full year's accounts from which to derive a turnover figure. The fixed fee will often therefore need to apply both in the first (partial) and second (i.e. first full) regulatory years of the firm's existence.

Question 14

In reference to firms that split or close (resulting in the creation of new firms), do you agree with the following statements?

- There should be no reduction in current year's fees already paid by the closing firm.
- The same flat fee charged in paragraph 68 should be charged to any resulting new firms.

Yes

No

Comments

The approach suggested by the Law Society and SRA is pleasing in its simplicity. However, it is perhaps unduly pessimistic about the possibility of calculating a figure for a new firm's turnover and/or FTE staff. The firm itself would almost certainly have to produce such an estimate as part of its business planning.

Effectively cutting the regulatory costs for many firms that split seems counter-intuitive, and during a period where it is likely that there will be a great deal of merger and splitting activity this could impact on the predictability of income for the regulator.

Question 15

Do you agree that overseas offices should be charged a flat firm fee on top of any PC fee payments to cover the additional administrative/regulatory cost of those firms which need to submit accounting reports to the SRA each year?

Yes

No

Comments

The Legal Services Commission is concerned only with the law in England and Wales. Few legal aid firms would have offices in other jurisdictions, with the possible exception of Scotland and Northern Ireland. The SRA and Law Society should make it clear whether such offices would count as "overseas".

The fee charged should reflect the impact an overseas office has on the overall regulatory risk posed or regulatory activity generated by a firm. If each overseas office gives rise to similar volumes of work, a fixed "per office" fee would be a reasonable mechanism. If, by contrast, the regulatory risk arises from the fact of a firm having overseas offices or not, a flat rate per firm would be appropriate.

Question 16

Do you agree that sole practitioners should contribute a firm fee as per the same fee structure as a firm with multiple partners and/or fee earners?

Yes

No

Comments

Sole practitioners operate a firm much like any other, except in so far as it has only one solicitor fee earner. The Legal Services Commission sees no prima facie reason why sole practitioners should be treated differently from other firms, unless there is evidence of a proportionately lower regulatory risk.

Question 17

What are your views on whether overseas offices should be charged an additional flat fee to cover the specific regulatory cost that they generate?

Please see comments on question 15 above

Question 18

In relation to the shifting of the fee burden onto private practice that will result from reducing the PC fee, do you favour adopting a phased approach to bring full impact over a period of years?

Yes

No

Comments

To mitigate the impact on firms and give them time to adapt, it would be sensible to allow a phased introduction of the new fees policy. The exact stages by which fees should move towards their final position, which we assume to be the 30% from individuals, 70% from firms split mentioned, is primarily a matter for the profession to feed back upon.

Question 19

Do you agree with the following principles for collecting the total compensation fund contribution from the profession?

- Collect a percentage of the compensation fund contribution from all individuals—wherever and however they practice at a fixed rate.
- Collect an additional compensation fund contribution amount from any solicitors not in private practice who hold client money.
- Collect the balance of the required compensation fund contribution from firms in private practice.

Yes

No

Comments

All solicitors benefit from the enhancement to their reputation that comes from the safeguard offered by the compensation fund. It is therefore appropriate that all individual solicitors continue to contribute, but that the majority of the fund should be drawn from individuals and organisations that hold client funds. Where firms hold little or nothing in the way of client funds, it is questionable whether they should contribute to so great an extent as those that do so more often.

Question 20

In terms of the split between total individual compensation fund contributions and total firm contributions, do you agree with the principle of recovering the same proportionate split as for the practising fees versus entity fees?

Yes

No

Comments

There is no obvious alternative means of splitting the amounts to be contributed; and in the absence of an alternative, the practising fee/entity fee split seems a reasonable choice.

Question 21

Should firm contributions to the compensation fund only be paid by those firms in private practice who hold client money?

- Yes, they are the firms at greatest risk of causing the compensation fund to pay out.
- No, all firms should contribute—the compensation fund is a key client protection, and is required to give the public confidence in the profession as a whole.

Comments

Ideally all firms should contribute to the compensation fund, but the contribution should be heavily weighted towards those that in practice hold client funds. As commented above regarding practising fees, the SRA and Law Society should consider whether there is scope to offer discounts for organisations that have strong risk management in place, or have made alternative insurance provision.

Question 22

What should be the factor determining the amount that a private practice firm (holding client money) contributes to the compensation fund (in addition to any contributions it makes on behalf of its individuals)?

- Size (amount of client money held)
- Risk of causing a claim on the compensation fund

Comments

The LSC believes that in principle the right approach is to focus on risk, and obtain contributions accordingly. However, this approach would need to be introduced gradually if it is not to result in severe difficulties for smaller entities, which will need time to adapt. The practicalities of establishing a clear measure of risk in this context, which must take into account the risk management processes that a firm operates and the controls it has in place, its alternative insurance measures, and any other factors that are relevant. This should be the subject of consultation with firms and consumer bodies.

Question 23

Do you agree that there should be an additional compensation fund contribution amount from any solicitors not in private practice who hold client money?

Yes

No

Comments

Subject to similar risk discounts to those mentioned above, the nature of the organisation for which a solicitor works should not have a particular bearing on how much they contribute to the fund.

Question 24

Do you think any of the principles or proposals in this paper are likely to have a negative or positive effect on any particular groups? If so, please give details.

Yes

No

Comments

Because they charge lower hourly rates than other firms, legal aid firms have quite different business models compared with those working solely in the private client market. The LSC is concerned that there are aspects of the proposals that could impact disproportionately on legal aid firms, and we request that SRA and the Law Society ensure that its impact assessment looks at any differential in impacts arising from providers' funding source.

The business models of many legal aid firms will make them vulnerable to some of the proposals outlined in the consultation. Proposals that look to base fees on the number of fee earners rather than the value of turnover, which have no regard to the inherent level of risk of the work conducted, and which do not take into account the risk management benefits of holding a quality standard, may impact disproportionately on firms that rely on legal aid work. It is important that SRA and the Law Society take account of all factors that contribute to a firm's risk profile.

The Legal Services Commission agrees that proposals that have a heavy impact on

smaller firms may, according to the data we hold, have a disproportionate impact on firms owned by black and minority ethnic solicitors. It will be necessary to see the data that is being collected with the 2009 Practising Certificate collection exercise to see the extent to which this is disproportionate.

Submission instructions

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **28 September 2009**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

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